No. 87-1495

In the Supreme Court of the United States

OCTOBER TERM, 1988

TALLAHASSEE BRANCH OF THE NAACP, ET AL., PETITIONERS

v.

LEON COUNTY, FLORIDA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a federal court, faced with the task of approving a remedial election plan to replace one it has invalidated under Section 2 of the Voting Rights Act, should defer to a mixed (at-large and single member) plan that complies with Section 2, when the plan was prepared by the local governing body but was not presented for referendum approval as required by state law.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. In December 1983, petitioners, representing black voters in Leon County, Florida, filed suit against respondents, the County and certain of its officials, alleging that the at-large election of all five members of the Leon County Commission diluted the voting strength of black voters, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 (Supp. App. 1-2).

Leon County is a non-charter county under Florida law.[1] In 1985, while this action was pending, Florida

[1]A non-charter county has only "such power of self-government as is provided by general or special law" (Fla. Const. art. VIII, § 1(f)).

enacted legislation that permitted non-charter counties to establish five-member County Commissions, to be elected from single-member districts, or seven-member Commissions, to have five members elected from single-member districts and two elected at-large.[2] The selection of either the five-member single-district plan or the seven-member mixed plan by a non-charter county required the approval of voters in a referendum. Absent such approval, non-charter counties had to retain at-large elections. Supp. App. 25. In contrast, charter counties under Florida law have the power to establish voting systems not specifically described by Florida legislation (*id.* at 25-26).[3]

In October 1985, the district court granted respondents' request for a continuance of trial in order to present a referendum to voters on election issues. The proposal was to change Leon County from a non-charter county to a charter county, and to establish a seven-member County Commission, with four members elected from single-member districts and three elected at-large (Pet. App. A3, A7; Supp. App. 26). In February 1986, voters rejected the proposal (*ibid.*).

The respondents then stipulated that they would not contest petitioners' claim that the existing at-large system violated Section 2 of the Voting Rights Act (Supp. App. 2, 22). On March 16, 1986, the district court ruled that the at-large system violated

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[2] The legislation, Fla. Stat. Ann. § 124.011 (West 1972 & Supp. 1985), implemented an amendment to the Florida Constitution that permitted commissioners to be elected as provided by law. Before the amendment of the Florida Constitution in November 1984, non-charter counties had to use at-large election systems. Supp. App. 25.

[3] Charter counties have "all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors" (Fla. Const. art. VIII, § 1(g)).

Section 2 and scheduled a trial on the remedy (*id.* at 22-23). Before the remedy trial, respondent Leon County Commission proposed a remedial plan to the court to establish a seven-member Commission, with five members elected from single-member districts and two at-large (Pet. App. A17 (Godbold, J., dissenting); Supp. App. 3). Petitioners conceded that respondents' plan complied with Section 2, but objected to it as an improper remedy (Supp. App. 3, 23). Petitioners proposed a remedial plan that would establish a five-member Commission, all elected from single-member districts (Pet. App. A17-A18 (Godbold, J., dissenting)).

2. The district court ordered the implementation of the mixed plan proposed by respondents (Supp. App. 1-36). Petitioners had contended that the court should reject the plan because, under state law, the county lacked power to enact it without voter approval. Because the plan had not been approved by referendum, petitioners argued that the court could not give to respondents' proposal the deference due under this Court's cases to remedial plans that are legislatively formulated (*id.* at 23). In petitioner's view, the absence of a valid "legislative" plan constrained the court to apply this Court's precedents for court-devised plans that require, absent special circumstances, that such plans contain only single member districts (*id.* at 24 (citing *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976)).

The district court rejected this argument. Citing this Court's decisions in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), and *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the court held that the five/two plan submitted by the County Commissioners was a "legislative" plan even though the County Commission did not have independent authority under state law to reapportion itself absent voter approval (Supp. App.

29-35). The court found that "[t]he plan proposed by the Leon County Commission is the product of legislative judgment" (*id.* at 35), and thus that the single member district requirement for court-ordered plans was not applicable. The court reasoned that "[t]he primary rationale behind prohibiting at-large seats is to avoid submerging minority voting strength" (*ibid.*). Because petitioners "concede that no dilution will result from th[e] inclusion [of at-large seats], it is difficult to imagine what federal policy would be furthered by this Court's imposition of an all single membered district plan" (*id.* at 35-36).

3. A divided court of appeals affirmed (Pet. App. A1-A46, 827 F.2d 1436).[4] The court began its analysis by noting that "when a reapportionment plan is judicially imposed by the district court, single member districts are preferred," whereas "when a reapportionment plan is drafted by a legislative body of the state, the plan is not always required to be restricted to single member districts" (827 F.2d at 1438). The court explained that "[p]rinciples of federalism and common sense mandate deference to a plan which has been legislatively enacted" (*ibid.*). The court then examined whether respondents' plan should be considered legislatively enacted, despite the County Commission's lack of independent authority to implement the five/two plan it preferred (*ibid.*).

The court noted that this Court in *Wise* v. *Lipscomb*, *supra*, had considered a similar issue, although a majority of the Court did not join in a single opinion. Justice White, the court explained, had announced the Court's judgment and concluded that the

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[4] Because the appendix to the petition omitted a portion of the court of appeals' opinion, we will cite to the reported opinion and not to the opinion reproduced in the appendix.

plan in that case, which included at-large seats, was legislative because the local body had power to enact it (827 F.2d at 1438). Justice Powell, joined by three other Justices, had written a separate opinion in *Wise* concluding that "whether the city council had authority under state law to enact the proposed plan was irrelevant," and "whenever a reapportionment plan is submitted by the elected representatives of the people, that plan should be given deference" (827 F.2d at 1439). The court then noted that the Supreme Court's later decision in *McDaniel* v. *Sanchez*, *supra*, which involved the applicability of the preclearance requirement of Section 5 of the Voting Rights Act (42 U.S.C. 1973c) to a remedial plan prepared by a local body for court approval, "implies that Justice Powell's concurrence has been adopted by a majority of the Court" (827 F.2d at 1439). The court stated that this Court in *McDaniel* "concluded that the plan at issue was legislatively enacted regardless of whether the state legislative body possessed such authority under state law" (827 F.2d at 1439). The court then applied the *McDaniel* test for a "legislative" plan to Leon County's proposal because it did "not believe the Supreme Court would adopt different definitions of 'legislatively enacted' for purposes of section 2 and section 5" of the Voting Rights Act (*id.* at 1440). The court added that "a broad definition of 'legislatively enacted' leaves reapportionment to be performed by a legislative body of the state rather than the federal judiciary" (*ibid.*).[5]

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[5] The court of appeals refused to follow an earlier Fifth Circuit decision, *McMillan* v. *Escambia County*, 688 F.2d 960 (1982), vacated on other grounds, 466 U.S. 48 (1984), which had held that a plan proposed by a county commission that did not have authority under state law to reapportion itself was

Judge Godbold dissented (827 F.2d at 1440-1447). He maintained that the applicable standards were those developed in Justice White's opinion in *Wise* v. *Lipscomb*, *supra*. Under that approach, Leon County's plan was "not a legislative plan as it was not enacted pursuant to the commissioners' authority but rather in derogation of their authority" (827 F.2d at 1444). He added that, in his view, the plan in this case would not be considered legislative even under Justice Powell's opinion in *Wise* because "the means to reapportion [via referendum] had been granted and were available but were not utilized" by Leon County (827 F.2d at 1445). The dissent distinguished *McDaniel* v. *Sanchez*, *supra*, because that case had involved only the interpretation of Section 5 of the Voting Rights Act (827 F.2d at 1446).

DISCUSSION

In our view, the courts below acted properly in giving deference to respondents' plan, notwithstanding that it was proposed by a state governmental body without independent authority to put such a plan into effect. The decision below does not conflict with any decision of this Court, and, although the reasoning of the Eleventh Circuit is not entirely consistent with that of a decision of the Fifth Circuit, the difference in outcome in that case can also be explained by its significantly different facts. While the court of appeals' opinion does leave some uncertainty about the essential characteristics of a legislative plan, at present the issue neither is encountered frequently enough nor is of sufficient importance in the formulation of voting rights remedies to warrant this Court's review.

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not a legislative plan. The court of appeals did not view itself bound by *McMillan* because that decision was vacated by this Court on other grounds (827 F.2d at 1440).

1. This Court has long recognized that "legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion" (*Reynolds* v. *Sims*, 377 U.S. 533, 586 (1964)). See *Burns* v. *Richardson*, 384 U.S. 73, 85 (1966); *Chapman* v. *Meier*, 420 U.S. 1, 26 (1974); *McDaniel* v. *Sanchez*, 452 U.S. 130, 138-139, 150 n.30 (1981).[6] "[L]egislative plans are likely to reflect a State's political policy and the will of its people more accurately than a decision by unelected federal judges" (*Connor* v. *Finch*, 431 U.S. 407, 431 (1977) (Powell, J., dissenting)). Remedial plans proposed by state legislative bodies may include multimember districts or at-large seats provided that the use of such seats does not violate federal statutory and constitutional voting protections.[7] *Wise* v. *Lipscomb*, 437 U.S. 535 (1978)

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[6] State bodies retain the primary role because "a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality" (*Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977)). It is only when a legislature fails to apportion itself consistently with its own policies and federal requirements that "a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task" (*id.* at 415). See also *Upham* v. *Seamon*, 456 U.S. 37 (1982) (per curiam); *Cook* v. *Luckett*, 735 F.2d 912, 918-919 (5th Cir. 1984) (upholding deference to legislative plan, noting that "[w]hile the maps depicting its result may seem odd, Madison County's political process involved just the sort of give-and-take between citizens and their elected officials that federal courts are unable to achieve").

[7] While recognizing that "multimember districts and at-large voting schemes may operate to minimize or cancel out

(allowing legislative remedy of eight single-member districts and three at-large seats for city council); *Burns* v. *Richardson*, 384 U.S. 73 (1966) (upholding state legislature's remedial plan for electing one chamber of a bicameral legislature from multimember districts).

When a federal court must devise its own remedial plan, however, the Court has instructed that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than *de minimis* variation" (*Chapman* v. *Meier*, 420 U.S. 1, 26-27 (1974) (footnote omitted)). The Court has explained that "[b]ecause the practice of multimember districting can contribute to voter confusion, make legislative representatives more remote from their constituents, and tend to submerge electoral minorities and overrepresent electoral majorties, this Court has concluded that single-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result" (*Connor* v. *Finch*, 431 U.S. at 415.[8]

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the voting strength of racial [minorities in] the voting population," (*Thornburg* v. *Gingles*, 478 U.S. 30, 47 (1986) (quotation marks omitted; brackets in original)), this Court has never held that at-large or multimember election systems are per se unconstitutional. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971); *Fortson* v. *Dorsey*, 379 U.S. 433 (1965).

[8] *Connor* followed a well-settled line of this Court's precedents regarding federal remedial principles, and its rule applies to local election plans as well as to state legislative and congressional districts. See *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976) ("[w]e have frequently reaffirmed the rule that when United States district courts

2. Under this Court's decisions, it is therefore necessary to identify whether a proposed remedial plan is "legislative" or "court-ordered," to determine whether at-large districts (that are consistent with Section 2 and the Constitution) may be included. In the remedial context, the conclusion that a plan is legislative results in deference by the federal court to the inclusion of at-large districts. The characterization of a remedial reapportionment plan as legislative or judicial is also relevant to determining whether preclearance is required under Section 5 of the Voting Rights Act (42 U.S.C. 1973c). In the Section 5 context, the conclusion that a plan is legislative means, in a covered jurisdiction, that the plan is subject to the preclearance requirement before it can go into effect.[9] This Court has addressed the definition of a legislative plan in both of these contexts, and those decisions support the conclusion of the court below that respondents' plan was a legislative one.

In *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), the Court considered whether a remedial plan proposed by a local body was legislative or court-ordered in determining the acceptability of its inclusion of at-

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are put to the task of fashioning reapportionment plans to supplant concededly invalid state legislation, single-member districts are to be preferred absent unusual circumstances"); *Chapman* v. *Meier*, 420 U.S. at 21; *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973); *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971) (per curiam) ("when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter"); *Connor* v. *Williams*, 404 U.S. 549, 551 (1972) (same). See also *Upham* v. *Seamon*, 456 U.S. 37, 42-43 (1982).

[9] Plans prepared and adopted by a federal court to remedy a constitutional violation are not subject to preclearance under Section 5. *Connor* v. *Johnson*, 402 U.S. at 691.

large districts. In that case, the Dallas City Council had adopted a voting system of three at-large and eight single-member districts to remedy a wholly at-large election plan that unconstitutionally diluted the votes of black citizens (*id.* at 538 (plurality opinion)). A divided Court held that the proposal was legislative, and, therefore, was not subject to the presumption in favor of single-member districts.

Justice White, joined by Justice Stewart, announced the Court's judgment and wrote an opinion stating that the city council had validly exercised its legislative powers, so that the plan was a "legislative" one in which at-large members were permissible (437 U.S. at 544).[10] Justice White distinguished *East Carroll Parish School Bd.* v. *Marshall*, 424 U.S. 636 (1976) (per curiam), in which the Court had rejected remedial plans prepared by local bodies that included multimember districts (437 U.S. at 545), by noting that in *East Carroll* "the bodies which submitted the plans did not purport to reapportion themselves" and that they "could not even legally do so," because the Attorney General had refused to grant preclearance under Section 5 of the Voting Rights Act (42 U.S.C. 1973c) to the state legislation purporting to give them such authority (437 U.S. at 545). Thus, "the mere act of submitting a plan was

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[10] Justice White rejected the argument that "the city was without power to enact the ordinance because the at-large system declared unconstitutional was established by the City Charter and because, under the Texas Constitution, and Texas statutory law, the Charter cannot be amended without a vote of the people" (437 U.S. 544 (citations omitted)). The lower courts had found, as a matter of Texas law, that "once the Charter provision was declared unconstitutional, * * * the Council was free to exercise its legislative powers which it did by enacting the eight/three plan" (*ibid.*; see also *id.* at 544 n.8)).

not the equivalent of a legislative Act of reapportionment performed in accordance with the political processes of the community in question" (*ibid.*).

Justice Powell wrote an opinion concurring in part and concurring in the judgment, joined by Chief Justice Burger and Justices Blackmun and Rehnquist (437 U.S. at 547-549). While agreeing that the Dallas plan was a "legislative" plan, Justice Powell disagree with the conclusion—that he attributed to Justice White—"that a proposed reapportionment plan cannot be considered a legislative plan if the political body suggesting it lacks legal power to reapportion itself" (*id.* at 548). Justice Powell relied on *Burns* v. *Richardson*, 384 U.S. 73 (1966), in which the Court had deferred to the remedial plan of the Hawaii legislature that included multimember districts even though the legislature lacked power under state law to reapportion itself. Justice Powell concluded that "the plan proposed by the Dallas City Council in this case must be considered legislative, even if the Council had no power to reapportion itself" because "[t]he essential point is that the Dallas City Council exercised a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court" (437 U.S. at 548).[11]

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[11] Justice Powell distinguished *East Carroll Parish School Bd.* v. *Marshall, supra,* as "turning on its peculiar facts" (*id.* at 549). In *East Carroll,* the Attorney General's disapproval of state legislation authorizing at-large elections "meant that the specific plans proposed by the school board and police jury in that case would have had unlawful effects" (*ibid.*). Thus, "the normal presumption of legitimacy afforded the balances reflected in legislative plans could not be indulged" (*ibid.* (citations omitted)).

In the dissent in *Wise,* Justice Marshall, joined by Justices Brennan and Stevens, found that *East Carroll Parish School*

Three years later, in *McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), the Court addressed the distinction between a legislative plan and a court-ordered plan in the Section 5 context. There, the voting plan for the Commissioners Court in Kleberg County, Texas, had been invalidated under one person, one vote principles (*id.* at 133-134). The Commissioners retained an expert who, at their instruction, developed a reapportionment plan that was then proposed to the federal court as a remedy (*id.* at 134-135). The Court found the plan to be a legislative one requiring preclearance under Section 5 before submission to the district court (*id.* at 153). The Court held that the requirement of preclearance "is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case" (*id.* at 152 (footnote omitted)).

In analyzing the applicability of Section 5, Justice Stevens, writing for seven members of the Court, relied on Justice Powell's opinion in *Wise* v. *Lipscomb*, *supra*, for the proposition that "the Commissioners Court's power under Texas law to adopt this plan

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Bd. v. *Marshall*, *supra*, led necessarily to the conclusion that the plan before the Court was judicially devised (*Wise*, 437 U.S. at 550-554). Justice Marshall contended that the council in *Wise* had proposed its plan "less as a matter of legislative judgment than as a response by a party litigant to the court's invitation to aid in devising a plan" (*id.* at 552) and maintained that past decisions did not "contemplate[] that a legislature could meet this responsibility [to enact a remedial plan] * * * by making a submission not in accordance with valid state procedures governing legislative enactments" (*id.* at 553 (footnote omitted)). He further argued that the Dallas plan was improper, even if legislative, because the use of multimember districts tended to dilute black voting strength (*id.* at 554-555).

should be irrelevant to the decision in this case" (452 U.S. at 146).

> As Justice Powell pointed out in *Wise* v. *Lipscomb*, * * * the essential characteristic of a legislative plan is the exercise of legislative judgment. *The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic.* The applicability of § 5 to specific remedial plans is a matter of federal law that federal courts should determine pursuant to a uniform federal rule.

(452 U.S. at 152 (emphasis added)).[12]

We believe that *Wise* and *McDaniel*, read together, strongly suggest that a plan should be viewed as legislative rather than judicial in origin—for purposes of both Sections 2 and 5—when it clearly embodies "policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J., concurring)). In *Wise*, six Justices agreed that the reapportionment plan adopted by the Dallas City Council was a legislative plan—Justice White and one other reasoning that the local body had authority to enact it and thus not deciding whether in every in-

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[12] The contention was made by the petitioner in *McDaniel* that the plan in issue was not legislative because "the Commissioners Court was without power to adopt the particular apportionment plan at issue in this case because it is permitted to redraw the boundaries of *election* precincts only in a July or August term," and the proposal was made during November (452 U.S. at 152 n.34 (emphasis in original)). The Court did not resolve the state law objection because of its holding that it was "irrelevant for purposes of § 5 coverage," but noted that "it is clear that the Commissioners Court possesses general authority to reapportion itself; petitioners challenge only the timing of the submission and adoption of the plan in this case" (*ibid.*).

stance such authority was necessary (437 U.S. at 544); and Justice Powell and three others reasoning that the existence of such authority was not necessary (*id.* at 547-549). Justice Powell's conception of what makes a plan legislative in origin was expressly adopted by seven members of the Court in *McDaniel*, albeit in the context of the Act's Section 5 preclearance requirement.

While the consequences of identifying a plan as legislative are very different in the remedial and preclearance contexts, there are good reasons for believing that the essential characteristics of a legislative plan should not vary on that basis. In both settings a court must determine whether a plan represents "a legislative judgment, reflecting the policy choices of the elected representatives of the people, rather than the remedial directive of a federal court" (*Wise*, 437 U.S. at 548 (Powell, J. concurring); see *McDaniel*, 452 U.S. at 153). The use of one standard for both sections of the Voting Rights Act will ensure that if a mixed plan is submitted for preclearance despite the proposing body's lack of authority to adopt it under state law, it will not, in every instance, be summarily rejected by the federal court precisely because of those state law issues. Moreover, deferring to a local plan despite possible state law objections removes from voting rights litigation a distracting issue that is not central to any federal policy, evades ready and consistent resolution, and is not in an area to which the federal courts bring any particular expertise.

3. Besides this case, there are to our knowledge only two other post-*McDaniel* court of appeals decisions that have addressed this issue. One of them was subsequently vacated on other grounds and no

longer has the force of law.[13] The other is the per curiam decision of the en banc Fifth Circuit in *LULAC* v. *Midland Independent School Dist.*, 829 F.2d 546 (1987). The court there rejected a local school board's reliance on *McDaniel*, and relied instead on Justice White's opinion in *Wise* v. *Lipscomb*, *supra*, in holding that the federal court need not defer to the plans proposed by the defendant school board (829 F.2d at 547-548). The court emphasized, however, that the school board's voting plans had either three or five seats out of seven elected at-large, and pointed out that those configurations were "contrary" to a state law requiring "no fewer than 70% of the board members to be elected from single-member districts" (*id.* at 547-548). Thus, in essence, the court held that the remedial plans were

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[13] The Fifth Circuit's decision in *McMillan* v. *Escambia County*, 688 F.2d 960 (1982) (holding that no deference was owed to a plan proposed by a body without authority under state law), came after *McDaniel* but did not cite that case, and the judgment was later vacated by this Court for reconsideration on the merits in light of the amendments to Section 2 (466 U.S. 48 (1984)). The Court expressly declined to decide the propriety of the court of appeals' remedial order (*id.* at 52 n.6).

On remand to the district court, the court found that *McDaniel* had "adopted Justice Powell's view, as set forth in his concurring opinion in *Wise*" (559 F. Supp. 720, 724 (N.D. Fla. 1983)), and that "Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a section 5 preclearance suit" (*ibid.*). The district court declined to implement the county's mixed five/two plan, however (*id.* at 725). The court found that the proposed plan would allow "blacks * * * an opportunity to elect 14% rather than 20% of the commission's membership," which would not remedy the dilution of the 20% black population's vote (*ibid.*). Moreover, at the time, Florida law did not permit a non-charter county to have a seven member commission, and the voters had rejected a change to charter status (*ibid.*).

not entitled to deference in their inclusion of a greater percentage of at-large seats than permitted by state law. The court of appeals in *Leon County* did not face that issue, nor does its opinion require deference to a proposed plan that actually violates state law in its configuration.[14] Thus, petitioner's contention (Pet. 17-20) that there is currently a conflict between decisions of the courts of appeals overlooks the differences between *LULAC* and this case, as well as the possibility that the circuits will arrive at consistent results on the remedial issues that were presented in the two cases.[15]

4. In general, a local governmental body's lack of authority to redistrict itself should not prevent the district court from treating that body's proposal as a legislative plan. However, some situations involving state law violations may well impair the validity of a proposal of a local body as a "reflect[ion] [of] the policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J. concurring)). In those limited situations, the federal

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[14] Florida law permitted the five/two mixed plan that respondents proposed (Supp. App. 25).

[15] A few district court opinions have discussed the conditions for deference to a legislative plan, and none is inconsistent with this case. See, *e.g.*, *Farnum* v. *Burns*, 561 F. Supp. 83, 92 n.13 (D.R.I. 1983) ("the plan at issue [in a legislative reapportionment] was drafted by a legislative consultant under the direction of a legislative body. The defendants' plan reflects the policy choices of the elected representatives and therefore must be considered as a legislative plan"); cf. *Ketchum* v. *City Council*, 630 F. Supp. 551, 563 n.25 (N.D. Ill. 1985) (approving a proposed plan not because a large majority of council members had intervened as plaintiffs and supported it, thus making it a legislative plan entitled to deference, but because it represented a valid compromise among most of the parties).

court would be justified in rejecting the local bodies' proposal as a legislative plan. We believe that such situations are highly exceptional. Further, if minor state law objections to legislative plans were routinely injected into the remedial phase of each voting case, the advantages of a clear test would be lost,[16] and the federal courts would be forced to play an inappropriate role of reviewing state law compliance in order to formulate remedial reapportionment plans.

No factor appears to be present here that would justify rejection of the Leon County plan.[17] To begin with, petitioners conceded that Leon County's plan complied with Section 2.[18] Moreover, respondents' plan is one of two configurations explicitly contem-

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[16] Cf. *McDaniel* v. *Sanchez*, 452 U.S. at 152 n.34 (alleged question of plan's compliance with state law was based on the adoption of the plan in November and its approval by the district court in January, when the local body arguably had power to redraw election precincts only during July or August).

[17] Respondents here were in a very similar situation to that of the Dallas City Council in *Wise* v. *Lipscomb*, *supra*. In *Wise*, the Council had no express authority to reapportion itself without amending the City Charter by a popular vote (437 U.S. at 544 (Opinion of Justice White)). In this case, Leon County had no authority to change its election system without a referendum. Thus, Justice Powell's conclusion that the "rule of deference to local legislative judgments remains in force even if * * * our examination of state laws suggests that the local body lacks authority to reapportion itself" (*id.* at 548), applies equally in this case.

[18] We express no opinion whether the record supports that conclusion. This Court has observed that "[o]f course, the District Court should defer to state policy in fashioning relief only where that policy is consistent with constitutional norms and is not itself vulnerable to legal challenge" (*White* v. *Weiser*, 412 U.S. 783, 797 (1973)).

plated by state law, and thus, unlike the plan in *LULAC* v. *Midland Independent School Dist.*, *supra*, does not utilize more at-large seats than state law allows.[19] The state law deficiency here is that the required referendum has not been held. As the district court found (see Supp. App. 26 n.1), the record does not support the conclusion that the voters have in any sense rejected the idea of a mixed plan. Cf. *McMillan* v. *Escambia County*, 688 F.2d 960, 970-973 (5th Cir. 1982) (affirming district court's holding that a mixed plan that had been rejected by voters in a referendum was not entitled to deference when resubmitted to the court by a legislative body without independent authority to reapportion itself), vacated on other grounds, 466 U.S. 48 (1984). Finally, there is no suggestion of an invalid motive behind respondents' proposed plan.[20]

Respondents' proposal thus appears to reflect "the policy choices of the elected representatives of the people" (*Wise*, 437 U.S. at 548 (Powell, J., concurring), and the court therefore properly accepted it. Certainly, that proposal better reflects the wishes and interests of the electorate than would a plan devised

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[19] A violation of state law relating to the substantive configuration of a plan raises different and more serious problems than are present when a required referendum has not been held. When a local legislative plan violates state law by containing more at-large seats than state policy permits, the rationale for a federal court to allow at-large seats in legislative plans—to defer to state policy about at-large districting (*Chapman* v. *Meier*, 420 U.S. 1 (1975))—is absent.

[20] Nor is the absence of state law authority for respondents to propose a plan due to the invalidation of such enabling legislation as an abridgement of federal voting rights. See *East Carroll Parish School Bd.* v. *Marshall*, *supra*.

by a federal court.[21] Because there is no suggestion that respondents' plan does not protect federal interests in voting rights, federal interests would not be served by declining to defer to the local legislature's inclusion of at-large seats.

5. While a grant of certiorari in this case would allow the Court to clarify an issue that has caused some analytical confusion in the lower courts, we believe that the Eleventh Circuit has reached the correct result here and that review at this time is not otherwise necessary. Courts have not in our experience regularly been faced with the peculiar situation presented here—*i.e.*, a legislative plan including at-large seats proposed by elected officials who are unable to enact that plan. Even where that situation arises, before a court can defer to a plan employing at-large seats, the plan must itself pass muster under Section 2.[22] It therefore appears that there is no substantial need for this Court's review of the issue at the present time.

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[21] In addition, after the remedial plan has been implemented, the state may change the election system as long as the new method does not violate federal voting protections. The order of the federal court is not intended permanently to displace state-enacted reapportionment plans or local election plans that themselves comply with the Voting Rights Act and the Constitution. See, *e.g.*, *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973).

[22] See, *e.g.*, *United States* v. *Dallas County Comm'n*, 850 F.2d 1433 (11th Cir. 1988) (holding that remedial election plan including four single-member districts and one at-large seat, proposed to replace invalid at-large election system, failed to comply with Section 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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